

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of Vermont Gas Systems, Inc.,)	
requesting a Certificate of Public Good pursuant)	
to 30 V.S.A. § 248, authorizing the construction)	
of the "Addison Natural Gas Project" consisting)	
of approximately 43 miles of new natural gas)	
transmission pipeline in Chittenden and Addison)	Docket No. 7970
Counties, approximately 5 miles of new)	
distribution mainlines in Addison County,)	
together with three new gate stations in)	
Williston, New Haven, and Middlebury,)	
Vermont)	

**VERMONT GAS SYSTEMS, INC.'S RESPONSE
TO AARP'S MOTION TO REOPEN THE EVIDENTIARY RECORD**

I. Introduction

Vermont Gas Systems, Inc. ("Vermont Gas," "VGS," or the "Company") hereby responds to the August 3, 2015 Motion to Reopen the Evidentiary Record ("Motion") filed by AARP on August 3, 2015. In its Motion, AARP requests that the Public Service Board (the "Board") reopen the record solely for the purpose of admitting into the record (1) the July 16, 2015 Complaint ("VGS Complaint") filed by VGS against Over and Under Piping Contractors, Inc. ("O&U"), (2) the July 21, 2015 Complaint ("O&U Complaint") filed by O&U against VGS, and (3) the July 24, 2015 VGS Press Release announcing the selection of Michels Corporation as the replacement mainline contractor. AARP does not request a new evidentiary hearing to address these documents, but asks that they be considered by this Board in the context of the pending proceeding on the second remand and relies upon these documents to support a renewed request to reopen this proceeding.

II. VGS Response

VGS does not oppose the admission into evidence of the documents for the limited purpose submitted by AARP. Because, however, the O&U Complaint constitutes inadmissible hearsay and AARP itself does not request that the document be admitted for the truth of the

matters alleged,¹ the document should be admitted only to establish that the O&U Complaint was filed and the statements therein were alleged.²

AARP's claims that the documents establish that VGS' testimony during the September 2014 and June 2015 hearings was misleading are inaccurate and should be rejected.

First, contrary to AARP's claims, the VGS Complaint, in addition to the record in this proceeding, demonstrates that the VGS project management team took timely and responsible steps to monitor O&U's performance, tracked performance against invoices, and ultimately determined relatively early in the overall Project construction cycle—by late November, 2014, five months into construction³—to terminate O&U.

Second, the fact that O&U was no longer the mainline contractor at the time of the June hearings was fully disclosed and discussed in the testimony of parties introduced during the June, 2015 hearings. Specifically, Ms. Peyser's May 6, 2015 testimony at page 41 explicitly raises this as an issue of concern to her:

The lack of a responsive contract for mainline construction combined with Mr. Roam's statement that revised construction costs are, in part, based on estimates from 'prospective' contractors suggests that VGS does not have a current mainline construction contractor in place. ...

Q32: Is it possible that bringing on a new contractor is a sign that VGS has it's act together now and has realized that with a better sense of the Project requirements, the company is better placed to get a favorable deal for construction on behalf of ratepayers?

A32: Maybe that's the case ...⁴

Ms. Peyser's testimony also cautioned that "even if VGS had signed a contract in June 2014 [for a mainline contractor] that has since been cancelled, the company was already more than four months behind on bringing on the most important vendor for the Project."⁵

¹ See *AARP Motion* at 4.

² See Reporter's Notes, V.R.E. 801 (instructing that statements offered other than for the truth of the matter asserted are not hearsay, such as testimony offered to prove "verbal acts").

³ The Project completion date is currently scheduled for Fall of 2016. See Roam 3/27/15 supp. pf. at 6. As such, the total construction cycle from commencement in June of 2014 to Fall of 2016 is over twenty-four months.

⁴ Peyser 5/6/15 pf. at 41.

⁵ *Id.* at 42.

In response to her stated concerns, Mr. Roam submitted rebuttal testimony that explicitly stated that VGS was in the process of obtaining a mainline contractor and that the estimate was developed with the review and input of multiple vendors:

[A]lthough Ms. Peyser characterizes the mainline contractor portion of the Project's construction estimate as being 'order-of-magnitude' in nature, such characterization does not imply that the estimate was developed without considering the Project's advanced degree of scope and design definition. Rather, it indicates that a contract has not been entered into, and some variability could occur during a negotiation period. This risk was addressed by factoring in contingency for potential variance to the estimate.

Multiple vendors conducted analyses to inform the mainline portion of the construction estimate. Examples of this are the bid clarifications, histogram and level-of-effort of activities, budgetary pricing breakdown and clarifications for exclusions in work papers provided in discovery response A.AARP:VGS.1-18A. In addition, several site visits and face-to-face discussions were held with vendors to discuss the scope and pricing of the mainline work, including additional discussions with the vendors to clarify the assumptions in the estimates they provided. The results represent much less than 50% of the overall estimate claimed by Ms. Peyser, the details of which are provided in discovery response A.DPS:VGS.1-12.⁶

Mr. Rendall's live testimony in response to Board questions at the technical hearings – as evidenced by the detailed cites in the AARP Motion – further evidences that VGS was fully forthcoming at the June hearings in stating that it was working “to complete a big ticket item of [contracting for] a mainline contractor.”⁷ The Press Release AARP now seeks to introduce is entirely consistent with Mr. Rendall's testimony that VGS was, at the time of the June hearings, very close to securing the new mainline contractor.

In addition, that O&U's Complaint may seek damages, particularly after its services were terminated by VGS, is neither surprising nor does it establish facts upon which this Board should rely upon to make a decision carrying consequences as severe as those that would result in reopening this case.⁸ “[T]he threshold a plaintiff must cross in order to meet our notice-pleading

⁶ Roam 5/27/16 reb. pf at 7.

⁷ AARP Motion at 6-7 (quoting tr. 6/22/15 at 53-54, 60-62, 64-65 (Rendall)).

⁸ The fact that O&U placed unperfected mechanics liens on the project has no bearing on the validity of its claims. Such a lien arises with respect to any contract for improvements to real property under 9 V.S.A. § 1921(a), but O&U

standard is ‘exceedingly low.’”⁹ As a mere notice pleading, the O&U Complaint does not by itself merit any evidentiary weight.¹⁰ In contrast, the fact that VGS developed its cost estimate utilizing a rigorous, industry accepted cost estimating approach and has reaffirmed the \$153.6 million cost estimate long after the O&U contract was terminated confirms its confidence that the dispute does not affect that estimate.¹¹

Finally, Mr. Roam’s supplemental testimony instructed that the Project team considered potential and pending payment requests that were in dispute while developing the current cost estimate: “The base estimate was developed through a process that consisted of . . . [a]nalyzing Project cost information, including reviewing historic cost data; change orders, invoices, and *claims submitted, approved, rejected, pending, and in dispute.*”¹² The team also solicited and evaluated “additional quotes from vendors to update construction estimates using information that reflects current market conditions.”¹³ The Board should therefore reject AARP’s suggestion that the billing dispute with O&U calls into question the reliability of the \$153.6 million cost estimate.

The only materially changed circumstance in this Section 248 proceeding that has direct bearing on the CPG is the estimated cost of the Project. That issue has been fully litigated over the course of this proceeding, and the weight of the evidence before the Board demonstrates that the Project continues to provide significant economic and environmental benefits to the State of Vermont and its residents. VGS has made excellent progress following the reset in December and remains on course to complete the Project on time and on budget.¹⁴ Reopening this

has not secured an attachment, which is required to perfect the lien and requires a demonstration that the claim has a reasonable likelihood of success. 9 V.S.A. § 1924; V.R.C.P. 4.1(c)(2).

⁹ *Block v. Gold*, 2008 VT 81, ¶4 184 Vt. 575, 959 A.2d 990 (citing *Henniger v. Pinellas County*, 7 F. Supp. 2d 1334, 1336 (M.D. Fla. 1998)); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that the notice pleading standard of the Federal Rules of Civil Procedure “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’”) (citations omitted).

¹⁰ See e.g., *Muzaffarr v. Ross Dress for Less, Inc.*, No. 12-61996-Civ-SCOLA, 2013 BL 398461, at *3 (S.D. Fla. May 06, 2013) (finding that “pleadings, and the allegations within them, are not evidence,” and stressing that at “the pleading stage of an action, a plaintiff must provide “a short and plain statement of the claim” showing an entitlement to relief”) (citations omitted).

¹¹ See exh. Pet. Reb. 5/17/14 RR-1 (detailing quarterly cost update for April 2015); Roam 5/27/15 reb. pf. at 7 (explaining that the risk associated with negotiating a new construction contract was factored into contingency); tr. 6/22/15 at 94-95, 106-07 (Roam) (describing the four main steps to the re-estimate process and highlighting that at the end you “don’t just get a new number,” you get a detailed understanding of the risks that could affect the Project at completion and a road map to manage those Project tasks that are most critical to cost outcomes).

¹² Roam 3/27/15 supp. pf. at 4.

¹³ *Id.*

¹⁴ Tr. 6/22/15 at 59-61 (Rendall).


proceeding will jeopardize the Project's schedule and budget,¹⁵ risk the continued viability of the Project, and ultimately adversely impact the general good of the State of Vermont.

III. Conclusion

For the above stated reasons, AARP's Motion does not provide a basis for granting the previously-filed Rule 60(b) motions to reopen the record.

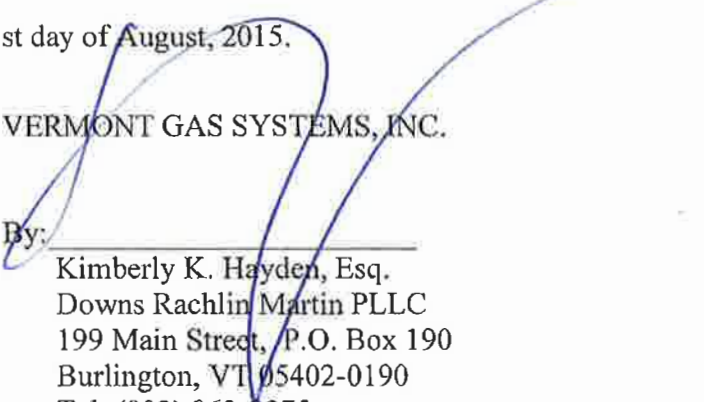
Dated at Burlington, Vermont, this 21st day of August, 2015.

By: _____


Peter H. Zappore
Sheehey Furlong & Behm P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891

VERMONT GAS SYSTEMS, INC.

By: _____


Kimberly K. Hayden, Esq.
Downs Rachlin Martin PLLC
199 Main Street, P.O. Box 190
Burlington, VT 05402-0190
Tel: (802) 863-2375

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¹⁵ Roam 1/15/15 pf. at 8 (explaining the consequences of significant delay); Roam 3/27/15 supp. pf. at 5-6 (same); Sinclair 3/27/15 supp. pf. at 3-4 (same). *See also Northwest Reliability Project*, Docket No. 6860, Order of 9/23/05 at 14, 25 (emphasizing cost impacts of delay in a complex linear construction project).